



SAN DIEGO
DEFENSE LAWYERS

THE UPDATE

SUMMER 2014

Investigating A Juror's Online Presence

By Daniel Fallon
TYSON & MENDES, LLP

On April 24, 2014, the American Bar Association Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 466 – Lawyer Reviewing Juror's Internet Presence. In the opinion, the Committee considered the following:

"Whether a lawyer who represents a client in a matter that will be tried to a jury may review the jurors' or potential jurors' presence on the Internet leading up to and during trial, and, if so, what ethical obligations the lawyer might have regarding information discovered during the review."

The Committee formally opined that:

Unless limited by law or court order, a lawyer may review a juror's or potential juror's Internet presence, which may include postings by the juror or potential juror in advance of and during a trial, but may not communicate directly or through another with a juror or potential juror.

A lawyer may not, either personally or through another, send an access request to a juror's electronic social media. An access request is a communication to a juror asking the juror for information that the juror has not made public and that would be the type of ex parte communication prohibited by Model Rule 3.5(b).

The fact that a juror or a potential juror may become aware that a lawyer is reviewing his Internet presence when a network setting notifies the juror of such does not constitute a communication from the lawyer in violation of Rule 3.5(b).

In the course of reviewing a juror's or potential juror's Internet presence, if a lawyer discovers evidence of juror or potential juror misconduct that is criminal or fraudulent, the lawyer must take reasonable remedial measures including, if necessary, disclosure to the tribunal.

More simply stated, using Facebook as an example, a lawyer can look at the juror's Facebook page before and during trial, but cannot seek to "friend" the juror. The former would not be an improper communication with a juror, the latter would be. Further, if the juror's Facebook page evidences juror or potential juror misconduct that is criminal or fraudulent, the lawyer **must** disclose same to the court.

In an interesting opinion, the Committee noted the "strong public interest in identifying jurors who might be tainted by improper bias or prejudice" and the equally strong public policy "in preventing jurors from being approached *ex parte* by the parties to the



case". The that in today's world, the line investigating communicating "increasingly where that line is.

Committee stated "Internet-saturated" between properly jurors and improperly with them is blurred." With the opinion, the Committee sought to clarify

In approving the "passive review" of a juror's social media presence or websites, the Committee stated that "the mere act of observing that which is open to the public" is not an improper communication. By analogy, the Committee noted that "a lawyer ... would not be engaging in an improper ex parte contact with a prospective juror by driving down the street where the prospective juror lives to observe the environs in order to glean publicly available information that could inform the lawyer's jury-selection decisions."

But, the Committee opined that sending an access request (e.g., a Facebook "friend"

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President's Message

By David B. Roper

LORBER, GREENFIELD & POLITO, LLP



The first thing on my list for this President's Message is to thank all the members of SDDL, our sponsors, and the rest of the San Diego legal community, for making our 2014 Juvenile Diabetes Research Foundation Golf Benefit a great success. We especially appreciated the visits from Alexis Rodriguez, Development Director for JDRF San Diego, and local high school students Jack Schwinkendorf and Chole Haddaway who personified the important purpose underlying the Benefit by sharing their struggles with juvenile diabetes. How often do you get to spend a beautiful San Diego afternoon playing golf with friends, eating and drinking well, and at the same time contribute to a great cause like JDRF? Thanks to Gabe Benrubi, Patrick Kearns and Deborah Dixon for their great work in pulling this

wonderful event together.

As you know, one of the ways SDDL tries to support the legal community and provide value to our members is through our Lunch & Learn and evening MCLE programs. So far this year we have presented speakers who covered topics ranging from forensic engineering and structured settlements to ethical considerations in social media and elimination of bias. Our evening programs included Judge Michael Orfield (Ret.) who shared his years of experience as a trial judge with his presentation on trial tactics from the judge's perspective, and Ben Howard conveyed his insights on the insidious Reptile Theory infiltrating the plaintiff's bar. Upcoming MCLE programs include Preparing Your Case for Appeal, Handling Parallel Civil, Criminal and Administrative Cases, and the Fundamentals of Uninsured Motorist Claims. And you shouldn't miss Judge Ken Medel's ruminations on The Attorney's Duty of Candor with the Bench coming in October. Of course, the year wouldn't be complete if we didn't provide that sought after MCLE credit in the detection and prevention of alcohol and substance abuse which will be presented in December by noted criminal defense attorney and DUI specialist Eric Ganci.

Please don't forget that on October 23, 24 and 25 we will once again be hosting the San Diego Defense Lawyers Mock Trial Competition. This year there will be 20 teams from 18 different law schools from all over the United States, the most diverse field we have ever had. This is an event I personally look forward to. The diligent and earnest effort put forth by the student competitors is truly invigorating. The idealism they exude is a great antidote to the cynicism we seem to acquire in our day to day practices. Of course, what makes this event work is the support we get from you, the lawyers, judges, mediators and legal support professionals who generously volunteer your time. Mark these dates on your calendar. Gathering enough volunteer judges to provide the experience these hard-working student competitors deserve is never easy. Your help is what makes it work.

Finally, be sure that you vote on November 4. There is still an important run-off for Superior Court Judge which needs to be decided. I urge you to investigate the candidates. Take a look at the last issue of the Update. Check out what the San Diego County Bar Association has to say. When you've educated yourself, share your knowledge with your colleagues, friends, and family. We all owe it to the community to make every effort to insure that only the most qualified candidates earn the right to preside in our home courts.

David B. Roper

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Membership is open to any attorney who is primarily engaged in the defense of civil litigants. Dues are \$145/year. The dues year runs from January 1 to December 31. Applications can be downloaded at: www.sddl.org

THE UPDATE

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LUNCH AND LEARN

Residential Construction Sequencing

By Patrick J. Kearns

WILSON ELSER MOSKOWITZ
EDELMAN & DICKER, LLP

On June 10, 2014, the San Diego Defense Lawyers offered its sixth “Lunch and Learn” of the year entitled “Residential Construction Sequencing”. Michael and Tracie Maxwell from S.C. Wright Construction gave an informative presentation highlighting the step-by-step process of building a house while focusing on the various areas of concern for construction defect lawyers. Michael Maxwell is a senior project manager with S.C. Wright Construction; a forensic construction firm that provides comprehensive consulting and expert witness services. Mr. Maxwell has been actively involved in the construction forensic industry for the past 25 years and testifies often on construction issues, personal injury matters, ADA compliance and wrongful death cases among others.

Tracie Maxwell is the Director of Operations at S.C. Wright. She holds general contractors licenses in California and Montana, and has over 20 years of experience in property management, HOA, Federally

subsidized housing, regionally funded house, custom home lendings and construction defect matters. She is responsible for monitoring both litigation and non-litigation project files for developers and subcontractors nationwide.

Michael and Tracie used a comprehensive set of photographs detailing every aspect of a residential construction from the foundation to the stucco on a step-by-step basis, discussing each process and the major “issues” or concerns which may arise during each step. By identifying the various inspection points and professionals who would be, or should be on-site, Michael and Tracie explained to the attendees who would have liability, and where that liability may lie. Michael and Tracie also identified common code violations and provided an overview of things to “look out for” when handling a construction defect case.

As with all SDDL Lunch & Learn presentations, attendees were treated to a catered lunch and an hour of MCLE credit. Don't miss out on these excellent programs! patrick.kearns@wilsonelser.com ♦

cover story continued from page 1

request) to a juror crosses the line – it is an improper communication because it asks the juror for information that the juror has not made public.

On the issue of the obligation of a lawyer who sees evidence of juror misconduct on a juror's social media site, the Committee drew a bright line where the juror's misconduct is fraudulent or criminal – the lawyer **must** act and report the misconduct to the court. But, where the juror conduct evidenced on the social media site or website violates court instructions to the jury but does not rise to the level of criminal or fraudulent conduct, the lawyer's obligation is less clear and not addressed by ABA Rule. The court noted:

“While any Internet postings about the case by a juror during trial may violate court instructions, the obligation of a lawyer to take action will depend on the lawyer's assessment of those postings in light of court instructions and the elements of the crime of contempt or other applicable criminal statutes. For example, innocuous postings about jury service, such as the quality of the food served at lunch, may be contrary to judicial instructions, but fall short of conduct that would warrant the extreme response of finding a juror in criminal contempt. A lawyer's affirmative duty to act is triggered only when the juror's known conduct is criminal or fraudulent, including conduct that is criminally contemptuous of court instructions.”

So, according to the ABA, trial lawyers can review the Facebook, LinkedIn, Twitter, Instagram, etc., pages of jurors and potential jurors in advance of, and during, trial without violating ABA ethical rules.

And well they should! Social media sites can provide a wealth of information that can be very useful in voir dire, jury selection, opening statement and closing argument. Social media postings can provide insights into a juror's politics, prejudices and predilections, insights which can be extraordinarily valuable at trial.

In fact, in the future and perhaps even now, not conducting Internet research into jurors could be risky. In an opinion footnote, the Committee noted as follows: *“While this Committee does not take a position on whether the standard of care for competent lawyer performance requires using Internet research to locate information about jurors that is relevant to the jury selection process, we are also mindful of the recent addition of Comment [8] to Model Rule 1.1. This comment explains that a lawyer “should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.”*

Daniel Fallon can be reached at dfallon@tysonmendes.com ♦



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California Supreme Court Addresses Liability of Architects to Future Homeowners

By Kevin J. Healy

BUTZ DUNN & DESANTIS, APC

On July 3, 2014, the California Supreme Court decided *Beacon Residential Community Association v. Skidmore, Owings & Merrill LLP* (July 3, 2014, S208173) __Cal.4th__, a case in which the plaintiff Association sued a condominium developer and various other parties, including two architectural firms (“defendant Architects”), over alleged construction and design defects. One of the principal defects alleged was “solar heat gain,” which made the condominium units uninhabitable and unsafe during certain periods due to high temperatures. The Association theorized in its complaint that the heat gain was due to the defendant Architects’ approval, in violation of the building code, of less expensive, substandard windows and a building design that lacked adequate ventilation.

At the trial court level, the defendant Architects demurred successfully on the grounds that they owed no duty of care to future homeowners with whom the defendant Architects had no contractual relationship. In particular, following long-standing California decisions entitled *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370 and *Weseloh Family Ltd. Partnership v. K.L. Wessel Construction Co., Inc.* (2004) 125 Cal.App.4th 152, the trial court reasoned that an architect who makes recommendations - but not final decisions - on construction issues, owes no duty of care to future homeowners with whom the architect had no contractual relationship. In *Beacon Residential*, however, the California Court of Appeal and, most recently, the California Supreme Court disagreed with

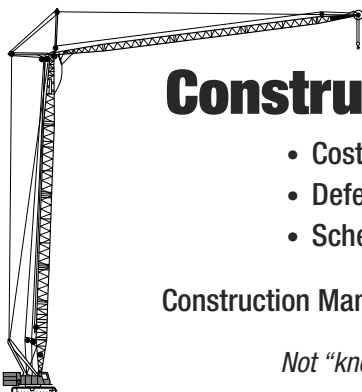
the trial court. The Supreme Court opinion explains that an architect may owe a duty of care to future homeowners in the design of a residential building under circumstances where the architect is a “principal architect” on the project, meaning the architect is not subordinate to other design professionals. The California Supreme Court further explained that this duty of care extends to such principal architects even though they do not actually build the project or exercise ultimate control over construction.

Throughout its 26-page *Beacon Residential* decision, the Supreme Court highlighted specific factors that led to its decision to extend liability to defendant Architects. First, since the trial court’s initial ruling arose at the demurrer stage, the Supreme Court was required to accept as true the well-pleaded facts in the operative complaint. In other words, for purposes of the *Beacon Residential* appeal, everything stated in the Association’s complaint was accepted as true and the court did not consider defendant Architects’ evidence to the contrary. Second, this decision pertains to residential, not commercial projects. The Court noted that homeowners are generally unsophisticated in construction matters whereas architects have special competency and exercise professional judgment on architectural issues such as the defects alleged in this case. Third, and perhaps most significant, according to the Association’s complaint the defendant Architects did much more than provide design services at the outset of the project. Instead, the Court noted that the defendant Architects actively used their expertise to bear implementation of their plans and specifications by performing weekly inspections at the construction site,

monitoring contractor compliance with the design, altering design requirements as issues arose, coordinating efforts of the design and construction teams, and advising the owner of any non-conforming work that should be rejected.

Of course, it is true that for many years California courts have held that architects can be liable to third parties. The lack of privity alone has certainly not absolved design professionals from tort liability. “After *Beacon Residential*, the question of whether a design professional acquired a duty of care clearly still turns on the extent of the specific role the design professional played in the project,” observed Peder K. Batalden of the appellate specialist firm, Horvitz & Levy. Although architects and their insurers may be disappointed that the California Supreme Court elected to extend liability under the facts of *Beacon Residential*, there is a “silver lining” according to Batalden because the Supreme Court did not adopt the Court of Appeal’s conclusion that California’s Right to Repair Act created an automatic duty. Thus, one key takeaway from *Beacon Residential* for defense attorneys is that design professionals can continue to contest on a case-by-case basis whether a duty is owed. What remains to be seen is whether trial courts will limit application of *Beacon Residential* to closely analogous circumstances.

About the author: Mr. Healy is a shareholder of Butz Dunn & DeSantis. He practices in the area of construction and development law including the representation of design professionals. He can be reached at khealy@butzdunn.com. ♦



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Insurance Law Update

By James M. Roth
THE ROTH LAW FIRM, APC

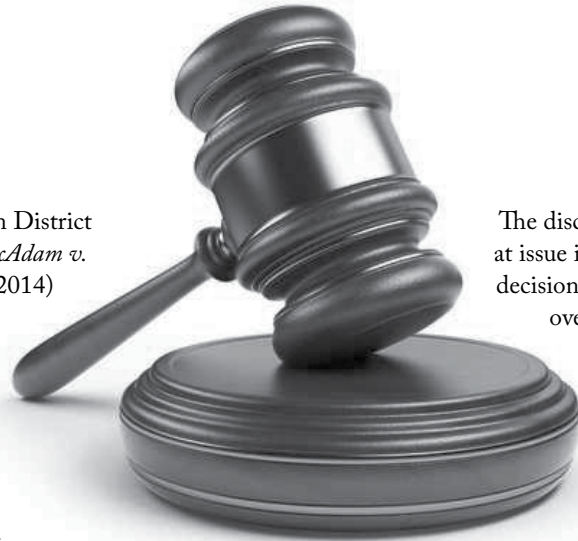
Since the last SDDL publication, the state and federal courts have handed down a variety of insurance related opinions traveling the spectrum of policy types and coverage related issues. Among those diverse opinions are two which merit substantive discussion below.

DOCUMENTS BY AND AMONG A LAW FIRM WITH AN INSURER, THE INSURER'S INDEPENDENT CLAIMS ADJUSTER AND THE INSURER'S INDEPENDENT CLAIMS ADMINISTRATOR MAY BE PROTECTED FROM DISCOVERY BY THE ATTORNEY-CLIENT PRIVILEGE IF THE DOMINANT PURPOSE OF THE INSURER'S RELATIONSHIP WITH THE LAW FIRM WAS ATTORNEY-CLIENT, RATHER THAN CLAIMS ADJUSTMENT, AND THAT THE COMMUNICATIONS AT ISSUE WERE REASONABLY NECESSARY FOR THE TRANSMISSION OF THE INFORMATION OR THE ACCOMPLISHMENT OF THE PURPOSE FOR WHICH THE LAW FIRM WAS CONSULTED.

On March 21, 2014, the United States

District Court, Southern District of California, held in *McAdam v. State Nat. Ins. Co., Inc.* (2014) --- F.Supp.2d ----, 2014 WL 1614515, that in determining whether a communication is subject to the attorney-client privilege under California law, the court looks to the dominant purpose of the attorney's work; thus, the attorney-client privilege does not apply when the attorney was merely acting as a negotiator for the client, merely gave business advice, or was merely acting as a trustee for the client.

The motion to compel discovery dispute giving rise to the litigation arises from a "Hull and Machinery/Protection and Indemnity" policy issued by State National Insurance Company, Inc. to Robert McAdam. Following a coverage dispute, McAdam filed his lawsuit in the federal court located in San Diego. Discovery proceeded thereafter under the charge of Magistrate Judge Mitchell D. Dembin.



The discovery dispute at issue in the published decision centered upon over 560 pages of documents previously withheld by the defense, along with an amended privilege log.

State National asserted the attorney-client privilege as to communications between itself and its outside counsel, Gordon & Rees, LLP ("G&R"), as well as communications between G&R and State National's independent claims adjuster and its independent claims administrator. Over 650 pages remained in dispute. State National submitted the disputed documents for review *in camera*, and the parties filed supplemental briefs. Magistrate Judge Dembin thereafter ruled that, among the issues before him, State National had failed to establish a *prima facie* case of privilege as to documents that predated the lawsuit.

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Chief Judge Barry Ted Moskowitz vacated the magistrate judge's discovery order and remanded the discovery dispute back to Magistrate Judge Dembin. Applying California law, C.J. Moskowitz found that State National failed to establish that the dominant purpose of its relationship with G&R was an attorney-client relationship rather than claims adjustment. C.J. Moskowitz noted that State National failed to provide promised declarations regarding the relationship. The magistrate judge undertook *in camera* review of the documents, although he was not required to, but according to C.J. Moskowitz, the disposition did not include sufficient explanatory findings and conclusions demonstrating why the documents were not covered by the privilege. The magistrate judge made only a summary conclusion on his reading of hundreds of pages of documents. The court stated that the best course of action was to have a full hearing as to the applicability of the privilege, and to decide the matter on very specific findings of fact and conclusions of law.

C.J. Moskowitz also determined that it was unclear from the records that there was no evidence that the independent claims administrator was covered by any attorney-client relationship between G&R and State National. The facts of the relationship between and among G&R, State National, and the independent claims administrator were not sufficiently established or revealed by the magistrate judge's analysis. If the magistrate judge found on remand that there was a primarily attorney-client relationship between G&R and State National prior to the lawsuit, he should also consider whether the relationship between State National and the independent claims administrator was such that attorney communications with the independent claims administrator were privileged as confidential disclosures reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer was consulted.

Finally, C.J. Moskowitz determined that, with respect to the independent claims adjuster hired by State National but apparently acted at the direction of the independent claims administrator rather than State National, only confidential communications necessary to facilitate or effectuate legal counsel, as opposed to claims adjustment, were privileged, and the magistrate judge was to decide on remand whether any of the independent claims adjuster's documents met that test.

INSURANCE ADJUSTERS, AS NON-PARTIES TO THE INSURANCE CONTRACT, ARE NOT IMMUNE FROM PERSONAL LIABILITY FOR INDEPENDENT TORTS THEY COMMIT WHILE ACTING ON BEHALF OF THE INSURER.

On April 2, 2014, the Court of Appeal, First District, Division 2, held in *Bock v. Hansen* (2014) 225 Cal.App.4th, 170 Cal. Rptr.3d 293, that an insured may assert claims for negligent misrepresentation and intentional infliction of emotional distress against their property insurer's adjuster separate and apart from claims against their property insurer.

Factually, in December 2001, Michael and Lorie Bock purchased from Travelers Property and Casualty Insurance Company, a homeowner's policy. The policy covered certain risks of physical loss to their home and provided additional coverage for debris removal. Early on the morning of September 9, 2010, a large limb — 41 feet long, some two feet in diameter, and weighing 7,300 pounds — broke off from an oak tree in the Bocks' front yard, "crashing into the chimney, the front of the house, and through the living room window." The giant limb caused three other large limbs to fall, which came to rest on a portion of the Bocks' chimney. The limbs "caused significant damage to the Bocks' chimney, which had been in working condition prior to the incident and was used as the Bocks' primary heating source for their home." The limbs also broke three windows and caused damage to the interior of the home, the Bocks' fence, and Mrs. Bock's car. The Bocks reported the incident to Travelers that same day. Travelers did not send an adjuster to the scene until the following day, when adjuster Craig Hansen arrived. Upon arrival, Hansen told Mrs. Bock that he only had a few minutes to review the damage, and in fact spent no more than ten to fifteen minutes at their home. Before Hansen took any pictures of the damage, he pushed several branches out of the living room window. When Mrs. Bock asked Hansen why he had not taken the pictures first, he ignored her, telling her to "clean up the mess," and demanding she clean up the living room. Moving outside, Hansen also removed the limbs leaning against the chimney and the fence before taking any pictures, all the while making derogatory comments about PG&E, Mr. Bock's employer, which Mrs. Bock found rude and upsetting. Before leaving, Hansen wrote a check for \$675.69. When Mrs. Bock

Bottom Line

Case Title: Tim Dupree, et al. v. Sajahtera, Inc., et al.

Case Number: BC463162

Judge: Hon. J Stephen Czuleger (Los Angeles County Superior Court)

Plaintiff's Counsel: Rob Hennig and Brandon Ruiz

Defendant's Counsel: Peter B. Maretz, Arch Y. Stokes, Diana Lerma, Hayden Pace

Type of Incident/Causes of Action: Sexual Harassment, Race Discrimination, Sexual Battery

Settlement Demand: Confidential (Plaintiff's counsel asked the jury for \$12.5M)

Settlement Offer: Confidential

Trial Type: Jury

Trial Length: 19 days

Verdict: Defense ♦

said that the amount would not be enough to even clean up, let alone repair the damage, Hansen told her that cleanup was not covered under the policy and that she should contact "friends and family members with chainsaws" to clean up the limbs and the mess in the house and backyard. Relying on these statements, Mrs. Bock attempted to clean up the broken glass, sustaining a cut on her hand. After Hansen left, Mr. Bock discovered that the fallen limbs had caused significant damage to the chimney. The next day, September 11, Mrs. Bock sent an email to Travelers Property Field Manager, Frank Blaha, reporting the chimney damage. She also requested that another adjuster be assigned to their claim because Hansen was "rude, disinterested, and rushed during his initial visit." Travelers ignored the request, and Hansen prepared an estimate, which Blaha sent to the Bocks on September 13. The estimate, which totaled \$3,479.54, reflected minimal amounts for each category of repairs needed, and was unreasonably low, as the Bocks had obtained an estimate the same day in the amount of \$2,065 for cut up and removal of the tree limbs alone. On September 15, Hansen again came to the house, this time accompanied by Blaha. The Bocks were present, as was Ron Priest, a licensed general contractor who was there at the Bocks' request. Hansen and Blaha were shown the significant cracks

SDDL Golf Tournament

By Patrick J. Kearns

WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP

On Friday, July 11, 2014, the San Diego Defense Lawyers Association held its annual Charity Golf Tournament benefiting the Juvenile Diabetes Research Foundation at the beautiful Country Club of Rancho Bernardo.

More than 100 of our city's best and brightest Judges, lawyers and friends took the course for a day filled with fun, excitement and San Diego's typical perfect weather. Upon arrival, contestants were treated to an open beer garden, an expertly-tended vodka bar, a candy-bar and a catered lunch before teams packed up their golf carts with the necessary provisions and headed off to the course in search of glory; or at least one of the many prizes at stake for achievements such as longest drive and closest-to-the-pin. Fortunately for most, the tournament was a "best ball" event and if needed, the players could purchase extra mulligans for a small donation.

Our generous sponsors set up camp at most of the holes throughout the course, offering everything from chicken wings, tacos, and mix-it-yourself trail-mix, to craft beer and whiskey shooters; and of course a few extra eyes to critique your next drive.

A fully catered dinner and reception was held after the event where those who may have been pro-golfers had it not been for law school accepted their prizes for the various hole contests and the rest of us anxiously awaited to hear our names called during the raffle. This year's raffle prizes were exceptional and included everything from hotel stays, to drivers and putters, to extravagant wine packages and more.

All in all, this year's golf tournament was a resounding success and another excellent opportunity to take a few hours away from the office to meet and mingle with colleagues from the defense bar and members of our local judiciary; all for a good cause. For those who were unable to attend this year, don't miss your chance to be part of this growing event at next year's tournament! ♦



▲ Matt Souther, Tamara Glaser and Mylaina Tighe



▲ Ben Cramer, Victoria Stairs and Robert Mardian



▲ Valerie Garcia Hong, Sharon Sherr and friends



▲ Regan Furcolo and a guest



▲ Dwayne Stein, Alan Brubaker, Hon. Steven Denton (Ret.), and Colin Walshok



▲ Dennis Aiken, Randall Winet, Link Ladtuko, Hon. Herbert Hoffman (Ret.) and two event sponsors



▲ Sasha Selfridge and Scott Barber



▲ Chris Greenfield, Sasha Selfridge, Hon. Kenneth Medel, Sharon Sherr, Ken Greenfield and Brian Rawers

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Saturday, September 13, 2014



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California Civil Law Update

By Monty McIntyre
ADR SERVICES, INC.

U.S. SUPREME COURT

ERISA

Fifth Third Bancorp v. Dudenhoeffer _ U.S. _ (2014): Under ERISA, the fiduciary of an employee stock ownership plan (ESOP) is not entitled to a presumption of prudence. ESOP fiduciaries are subject to the same duty of prudence that applies to ERISA fiduciaries in general. (June 25, 2014.)

Healthcare

Burwell v. Hobby Lobby Stores, Inc. _ U.S. _ (2014): The Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U. S. C. section 2000bb et seq., prohibits the United States Department of Health and Human Services from demanding that three closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners. (June 30, 2014.)

9th CIRCUIT COURT OF APPEALS

Americans With Disabilities Act

Cohen v. City of Culver City _ F.3d _ (9th Cir. 2014), 2014 WL 2535329: The Court of Appeals reversed in part the district court's summary judgment for defendants. The Court of Appeals concluded that a genuine dispute of material fact existed as to whether the City denied plaintiff access to the sidewalk by reason of his disability by allowing a vendor's display to completely block the curb ramp, impeding disabled access to the public sidewalk, and by failing to post signs identifying alternative disabled access routes. (June 6, 2014.)

Class Actions

Laguna v. Coverall North America Inc. _ F.3d _ (9th Cir. 2014): The Court of Appeals affirmed the district court's approval of a settlement agreement reached before class certification. The district court properly concluded that the settlement, including an award of attorney fees of \$994,800, was fair, reasonable, and adequate. (June 3, 2014.)

Consumer Protection

Sinibaldi v. Redbox Automated Retail, LLC _ F.3d _ (9th Cir. 2014), 2014 WL 2535471: The Court of Appeals affirmed the district court's dismissal under Rule 12(b)(6). Redbox's collection of personal ZIP code information in kiosk rental transactions fell outside the reach of California Civil Code section 1747.08(a) of the California Song-Beverly Credit Card Act because the customer's credit card was used as a deposit to secure payment in the event of loss or late return, and the transaction was therefore exempt under section 1747.08(c)(1). (June 6, 2014.)

Employment

Davis v. Nordstrom, Inc. _ F.3d _ (9th Cir. 2014): The Court of Appeals reversed the district court's order denying a motion to compel arbitration. Following the United States Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), Nordstrom made revisions to the employee arbitration policy contained in its employee handbook, including rules precluding most class action lawsuits. The Court of Appeals found that Nordstrom complied with the 30-day notice requirement in its policies, and that California law imposed no duty upon Nordstrom specifically to inform employees that their continued employment constituted acceptance of new terms of employment. (June 23, 2014.)



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Jobnmohammadi v. Bloomingdales, Inc. _ F.3d _ (9th Cir. 2014): The Court of Appeals affirmed the district court’s order granting a motion to compel arbitration. Plaintiff had the right to opt out of the arbitration agreement, and, had she done so, she would be free to pursue her class action in court. Having freely elected to arbitrate employment-related disputes on an individual basis, without interference from Bloomingdale’s, plaintiff could not claim that enforcement of the agreement violated either the Norris-LaGuardia Act or the National Labor Relations Act. (June 23, 2014.)

CALIFORNIA SUPREME COURT

Class Actions

Ayala v. Antelope Valley Newspapers, Inc. (2014) _ Cal.4th _ : The California Supreme Court affirmed the Court of Appeal ruling that had remanded for reconsideration the trial court’s order denying class certification. The issue was whether persons delivering newspapers were employees or independent contractors. Whether a common law employer-employee relationship exists turns foremost on the degree of a hirer’s right to control how the end result is achieved. (*S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 350.) Whether the hirer’s right to control can be shown on a classwide basis will depend on the extent to which individual variations in the hirer’s rights vis-à-vis each putative class member exist, and whether such variations, if any, are manageable. The decision was remanded because the trial court improperly rejected certification based not on differences in Antelope Valley’s right to exercise control but on variations in how that right was exercised. (June 30, 2014.)

Evidence

People v. Goldsmith (2014) _ Cal.4th _ , 2014 WL 2519: The California Supreme Court affirmed the rulings of the Court of Appeal and the trial court regarding the admissibility of automated traffic enforcement system (ATES) evidence. The trial court did not abuse its discretion in ruling that the police investigator’s testimony provided sufficient authentication to admit the ATES evidence and that the ATES evidence was not hearsay. (June 5, 2014.)

Torts

Verdugo v. Target Corporation (2014) _ Cal.4th _ : The California Supreme Court held that under California law, Target’s common law duty of care to its customers does not include a duty to acquire and make available an automated (or automatic) external defibrillator for use in a medical emergency. (June 23, 2014.)

CALIFORNIA COURTS OF APPEAL

Attorney Fees

Syers Properties III, Inc v. Rankin (2014) _ Cal. App.4th _ , 2014 WL 1761923: The Court of Appeal affirmed the trial court’s award of \$843,245.27 in attorney fees to prevailing defendants under Civil Code section 1717 and Code of Civil Procedure section 1033.5. The trial court did not abuse its discretion in accepting defense counsel’s computation of attorney hours as hours reasonably spent working on the case. Nor did the trial court abuse its discretion in making the rate determination. The rate determination was supported not only by the adjusted Laffey Matrix, but also by Attorney Finney, an attorney with more than 20 years experience in civil litigation of this type, who stated under penalty of perjury his opinion as to the prevailing rate in the San Francisco Bay Area for the services performed by the attorneys and paralegals in the case at rates virtually identical to those calculated in the Laffey Matrix as adjusted for the San Francisco-San Jose-Oakland Region. (C.A. 1st, filed May 5, 2014, published May 27, 2014.)

Civil Procedure (anti-SLAPP)

California Public Employees Retirement System v. Moodys Invest (2014) _ Cal.App.4th _ , 2014 WL 2186539: The Court of Appeal affirmed the trial court’s denial of an anti-SLAPP motion. The trial court properly concluded that, although CalPERS’ complaint was based upon conduct by the rating agency defendants that fell within the scope of the anti-SLAPP statute, early dismissal would be improper because CalPERS had successfully demonstrated a probability of prevailing on the merits of its sole claim of negligent misrepresentation. (C.A. 1st, May 23, 2014.)

City of Montebello v. Vasquez (2014) _ Cal. App.4th _ , 2014 WL 2424914: The Court of Appeal affirmed the trial court’s denial of an anti-SLAPP motion because defendants failed to demonstrate that their conduct constituted protected activity. The City sued city council members and a city official for violations of Government Code section 1090, which prohibits city officers and employees from having a financial interest in any contract made by them in their official capacity. Defendants claimed their votes were protected activity. The Court of Appeal disagreed, observing that an elected representative’s vote and acts of governance mandated by law, without more, are not exercises of free speech or petition. (C.A. 2nd, filed April 30, 2014, published May 30, 2014.)

Graham v. Bank of America (2014) _ Cal. App.4th _ , 2014 WL 2149725: The Court of Appeal affirmed the trial court’s order sustaining a demurrer without leave to amend to the second amended complaint. Plaintiff alleged that defendants made fraudulent misrepresentations or omissions by stating the appraised fair market value of his home in 2004 was “increasing” and the loan was “good” for him while allegedly knowing the appraisal was “outrageously speculative.” Plaintiff sought to hold the defendants responsible for the decline in his property value as well as the collapse of the real estate market. Plaintiff’s allegations failed to state causes of action for fraud and deceit, violations of Business and Professions Code section 17200, and declaratory relief. (C.A. 4th, May 23, 2014.)

Piccinini v. California Emergency Management Agency (2014) _ Cal.App.4th _ , 2014 WL 2443867: The Court of Appeal affirmed in part and reversed in part the trial court’s order sustaining a demurrer, without leave to amend, to plaintiff’s first amended complaint. Plaintiff was offered and accepted employment as a deputy chief in the California Emergency Management Agency. The Friday night before he was to report for work, he was told not to come because the position for which he was hired had been eliminated. The trial court properly sustained the demurrer to the breach of contract and wrongful termination causes of action. However, the trial court erred in sustaining the demurrer to the promissory estoppel cause of action because plaintiff alleged a claim for estoppel within the scope of Government Code 19257. (C.A. 1st, May 27, 2014.)

Staniforth v. The Judges’ Retirement System (Chiang) (2014) _ Cal.App.4th _ , 2014 WL 2212515: The Court of Appeal affirmed the trial court’s order sustaining a demurrer, but reversed its order denying a subsequent motion to partially vacate that order. The trial court properly sustained the demurrer by defendant to plaintiffs’ claim they had been underpaid because they had not been given proper cost of living adjustments. But the trial court erred in denying the motion to partially vacate the order sustaining the demurrer on the basis that, under the case law as interpreted by the JRS and adopted by the trial court, their action had asserted viable claims on behalf of 10 class members who were allegedly not paid the amounts due to them under case law as interpreted by the trial court. (C.A. 4th, filed May 19, 2014, published May 29, 2014.)

CALIFORNIA CIVIL LAW UPDATE
continued from page 13

Civil Procedure (summary adjudication)

Delon Hampton & Assoc. v. Superior Court (2014) _ Cal.App.4th _ : The Court of Appeal granted a writ of mandate directing the trial court to sustain a demurrer, without leave to amend, to a cross-complaint alleging improper design and construction of a stairway and handrail at a Metropolitan Transit Authority Station in LA. Because the defects alleged were patent, the action was barred by the four year statute of limitations in Code of Civil Procedure section 337.1. (C.A. 2nd, June 23, 2014.)

Department of Fair Employment & Housing v. Ottovich (2014) _ Cal.App.4th _ : The Court of Appeal affirmed the summary judgment for plaintiff after defendant's answer was stricken due to discovery abuses. When the trial court vacated a default judgment because plaintiff had not filed a statement of damages, it was not also required to reinstate defendant's answer. (C.A. 1st, June 30, 2014.)

Naser v. Lakeridge Athletic Club (2014) _ Cal. App.4th : The Court of Appeal affirmed the trial court's award of costs to defendant after it prevailed on a motion for summary judgment. The trial court properly awarded jury fees, and concluded that defendant could recover deposition costs under Code

of Civil Procedure section 1033.5 (a) (3) for the cost of serving and processing business record subpoenas for the production of medical records without an in-person appearance of the custodian of records. (C.A. 1st, June 27, 2014.)

Old Republic Construction Program Group v. The Boccardo Law Firm, Inc. (2014) _ Cal. App.4th _ : The Court of Appeal affirmed the trial court's denial of an anti-SLAPP motion. Because the withdrawal of settlement funds from a trust account was neither communicative in character nor related to an issue of public interest, the trial court properly denied the anti-SLAPP motion to dismiss. (C.A. 6th, June 27, 2014.)

Paramount Petroleum Corporation v. Superior Court (Building Materials Corporation of America) (2014) _ Cal.App.4th _ : The Court of Appeal affirmed in part and reversed in part the trial court's rulings on cross-motions for summary adjudication. The trial court erred in granting summary adjudication in Building Materials Corporation dba GAF Materials Corporation's (GAF) favor on liability, because summary adjudication cannot be granted in favor of a plaintiff on liability alone, but the trial court did not err in granting GAF summary adjudication on Paramount's defense of mutual mistake. (C.A. 2nd, June 20, 2014.)

Peake v. Underwood (2014) _ Cal.App.4th _ : The Court of Appeal affirmed the trial court's sanctions order under Code of Civil Procedure section 128.7 dismissing plaintiff's complaint against a defendant real estate agent, and ordering plaintiff to pay \$60,000 in attorney fees to the defendant. Plaintiff's claims were factually and legally frivolous because the undisputed evidence showed the agent had fulfilled his statutory and common law disclosure duties, and plaintiff had actual notice of facts disclosing prior problems with the subfloors. Plaintiff declined to dismiss the action during the statutory safe harbor period, and instead amended her complaint to add claims similar to claims she had previously dismissed. (C.A. 4th, June 25, 2014.)

Rufini v. CitiMortgage, Inc. (2014) _ Cal. App. _ : The Court of Appeal affirmed in part and reversed in part the trial court's order sustaining demurrers, without leave to amend, to a complaint arising from a failed home loan modification and eventual foreclosure. The trial court erred in not allowing plaintiff leave to amend the causes of action for breach of contract, negligent misrepresentation and violation of Business & Professions Code section 17200. The trial court properly sustained the demurrers to the causes of action for negligence, breach of fiduciary duty and an accounting. (C.A. 1st, filed May 28, 2014, published June 23, 2014.)

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Corporations (contractors)

E. J. Franks Construction, Inc. v. Sabota (2014) _ Cal.App.4th _ : The Court of Appeal affirmed the trial court's ruling the plaintiff corporation could sue for quantum meruit for work performed. Mr. Franks became a licensed general building contractor in 1995 and operated a sole proprietorship for years. During the course of constructing a home for defendants, Mr. Franks incorporated his company under the name E. J. Franks Construction, Inc. (EJFCI) and on April 12, 2005, his contractor's license was reissued to the corporation. The trial court properly rejected defendants' claim that EJFCI was prohibited by Business and Professions Code section 7031 from pursuing *quantum meruit* damages because it was an unlicensed contractor at the time the construction contract was entered into. Section 7031 did not apply to the unique situation in this case because to do so would not advance the statute's goal of precluding unlicensed contractors from maintaining actions for compensation. (C.A. 5th, June 5, 2014.)

Employment

Piccini v. California Emergency Management Agency (2014) _ Cal.App.4th _ , 2014 WL 2443867: See summary above under Civil Procedure.

Government

Disenhouse v. Peevey (2014) _ Cal.App.4th _ : The Court of Appeal affirmed the trial court's ruling that it lacked jurisdiction. Plaintiff filed a motion for an injunction in the trial court to stop members of the PUC from meeting because they would not allow her to attend. The trial court properly ruled it lacked jurisdiction because Public Utilities Code section 1759 deprives the superior courts of jurisdiction "to enjoin, restrain, or interfere with" the Public Utilities Commission (Commission) in the performance of its official duties. Although Government Code section 11130 authorizes any interested person to "commence an action by mandamus, injunction, or declaratory relief for the purpose of stopping or preventing violations or threatened violations" of the state's open meeting law, a person desiring to commence such an action against the Commission may only do so by filing a petition for writ of mandate in the Supreme Court or the Court of Appeal. (C.A. 4th, June 3, 2014.)

Insurance (Homeowners)

Maslo v. Ameriprise Auto & Home Insurance (2014) _ Cal.App.4th _ : The Court of Appeal reversed the trial court's order sustaining a demurrer by the carrier. After sustaining bodily injuries from an accident

caused by an uninsured motorist, Maslo filed a claim seeking the \$250,000 limit under the uninsured motorist coverage. The carrier demanded arbitration. After being awarded \$164,120.91 by the arbitrator, Maslo filed a second amended complaint (SAC) against the insurer alleging that the insurer breached the implied covenant of good faith and fair dealing by forcing the insured to arbitrate his claim without fairly investigating, evaluating and attempting to resolve it. The Court of Appeal concluded the complaint adequately stated a claim for bad faith when it alleged that the insurer, presented with evidence of a valid claim, failed to investigate or evaluate the claim, insisting instead that its insured proceed to arbitration. The carrier's right to resolve a claim through arbitration did not relieve it of its statutory and common law duties to fairly investigate, evaluate and process the claim. And absent a genuine dispute arising from an investigation and evaluation of the claim, the carrier may not escape liability for bad faith because the amount awarded in arbitration was less than the policy limits or the initial demand. (C.A. 2nd, June 27, 2014.)

Upasani v. State Farm General Insurance Company (2014) _ Cal.App.4th _ : The Court of Appeal affirmed the trial court's summary judgment for State Farm. Plaintiffs were sued for conspiring to aid a mother in abducting her son from his father. State Farm denied the tender of the defense of that action because abduction claims were not covered claims under the terms of the State Farm policies. The trial court properly granted summary judgment because State Farm offered admissible evidence showing the claimed loss suffered in the underlying case was not within the insuring agreement, and plaintiffs failed to establish a triable issue of material fact. (C.A. 4th, filed June 6, 2014, published June 26, 2014.)

Medical Board of California

Lewis v. Superior Court (Medical Board of California) (2014) _ Cal.App.4th _ , 2014 WL 2212122: The Court of Appeal affirmed the trial court's denial of a writ petition. Dr. Lewis filed a writ petition claiming the Medical Board of California violated his patients' informational privacy rights in their controlled substances prescription records when the Board obtained data from the Controlled Substance Utilization Review and Evaluation System (CURES, see Health & Safety Code section 11165) during a disciplinary investigation of Dr. Lewis. The Court of Appeal concluded the CURES statute does not amount to an impermissible

Bottom Line

Case Name: Marcus Laniohan v. Zane Keith, et al.

Case No.: 37-2013-00034936-CU-PA-CTL

Judge: Hon. Randa Trapp

Plaintiff's Counsel: Edward "Skip" Babbitt, Esq., Rosalee Burrell, Esq., Parker Strauss LLP

Defense Counsel: John T. Farmer, Esq. Farmer Case & Fedor

Type of Action: Personal injury - pickup truck vs. skateboarder

Trial Length: 4 day jury

Plaintiff's experts: Steven Plourd – accident reconstruction, Paul Girard, MD – trauma surgeon

Defense experts: Alvin Lowi III – accident reconstruction, Raymond M. Vance, MD – orthopedics, Brian Bergmark – forensic economics

Injuries/Damages: Fractured scapula with residual bone fragment in armpit, 5 non-displaced rib fractures, neck and back. Claimed medicals of \$45,000. Claimed loss of earning of \$120,000.

Demand: Last demand before trial was \$75,000, CCP 998. Plaintiff asked the jury to award \$562,000.

Offer: \$5,000 CCP 998, raised to \$25,000 CCP 998. Defense asked for finding of no negligence.

Verdict: Defense, 12-0 on issue of defendant's negligence ♦

invasion of the state constitutional right to privacy of patients, because there are sufficient safeguards to prevent unwarranted public disclosure and unauthorized access to CURES data. (C.A. 2nd, May 29, 2014.)

Real Property

Graham v. Bank of America (2014) _ Cal. App.4th _ , 2014 WL 2149725: See summary above under Civil Procedure.

San Francisco Beautiful v. City and County of San Francisco (AT&T California) (2014) _ Cal.App.4th _ , 2014 WL 2306654: The Court of Appeal affirmed the trial court's judgment for defendants on a writ petition. Defendants approved a project by AT&T

On the Move

◆ HEATHER ROSING ELECTED VICE PRESIDENT OF THE STATE BAR OF CALIFORNIA

The Board of Trustees of the State Bar of California has elected Klinedinst Shareholder and SDDL member Heather Rosing to serve as Vice President of the organization in 2014-2015.

Ms. Rosing currently serves as Treasurer of the State Bar, as well as chairperson of the Audit and Regulation, Admissions and Discipline Oversight committees. She represents attorneys in District 4, which covers Imperial, Inyo, Orange, Riverside, San Bernardino and San Diego counties. Ms. Rosing has served as an elected member of the board since 2011, and will be sworn in as Vice President during the Bar's 87th Annual Meeting, taking place in San Diego September 11-14, 2014.

The San Diego Defense Lawyers congratulates Ms. Rosing on this prestigious selection by the State Bar's Board of Trustees.



◆ CLARK HUDSON ELECTED TO THE BOARD OF DIRECTORS OF THE FEDERATION OF DEFENSE & CORPORATE COUNSEL

Former SDDL President Clark Hudson has been elected to the Board of Directors of the Federation of Defense & Corporate Counsel (FDCC). Founded in 1936, FDCC is an international defense organization dedicated to the principles of knowledge, justice, and fellowship and composed of recognized leaders in the legal community who have achieved professional distinction, is dedicated to promoting knowledge, fellowship, and professionalism of its members as they pursue the course of a balanced justice system and represent those in need of a defense in civil lawsuits.

Mr. Hudson is a Shareholder at Neil, Dymott, Frank, Trexler & McFall APC. The San Diego Defense Lawyers congratulates Mr. Hudson on this prestigious selection by the members of FDCC.



◆ BALESTRERI POTOCKI & HOLMES ADDS NEW ASSOCIATE

The law firm of Balestreri Potocki & Holmes is pleased to announce that Quelim Saechao joined the firm as an associate. Ms. Saechao practices in the areas of professional liability, employment law, products liability, and general civil litigation. Her practice emphasizes construction law and focuses on matters related to allegations of construction defect against developers, builders, and general contractors as well as professional negligence against design professionals. She received her Bachelor of Arts from the University of California, Davis in 1999 and her Juris Doctor from California Western School of Law in 2004. ◆

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CALIFORNIA CIVIL LAW UPDATE

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California to install 726 metal utility boxes housing telecommunications equipment on San Francisco sidewalks in order to expand its fiber-optic network. Plaintiff's writ petition challenged the approval claiming it violated the California Environmental Quality Act (CEQA). The trial court properly denied the writ petition because the project fell within a categorical exemption under CEQA. (C.A. 1st, filed April 30, 2014, published May 30, 2014.)

Sierra Club v. County of Fresno (Friant Ranch, L.P.) (2014) _ Cal.App.4th _ , 2014 WL 2199317: The Court of Appeal reversed the trial court's judgment for defendants on a writ petition. The writ petition challenged the approval of the Friant Ranch project, a proposed master-planned community for persons age 55 or older located in north-central Fresno County (the Project), located on 942 acres of unirrigated grazing land adjacent to the unincorporated community of Friant, below Friant Dam and Millerton Lake, near the San Joaquin River. The Court of Appeal found the Project was consistent with land use and traffic policies, and found no problem with the adequacy of the Environmental Impact Report (EIR) regarding wastewater disposal. The Court of Appeal, however, concluded the EIR was inadequate in addressing air quality impacts, and a revised EIR was required. (C.A. 5th, May 27, 2014.)

Torts

Delon Hampton & Assoc. v. Superior Court (2014) _ Cal.App.4th _ : See summary above under Civil Procedure (summary adjudication).

Haver v. BNSF Railway Co. (2014) _ Cal. App.4th _ , 2014 WL 2466570: The Court of Appeal affirmed the trial court's order sustaining a demurrer without leave to amend. The trial court properly relied on the holding in *Campbell v. Ford Motor Co.* (2012) 206 Cal.App.4th 15 when it sustained a demurrer without leave to amend in a wrongful death action based on premises liability brought by the survivors of a woman who died of mesothelioma as a result of exposure to asbestos from her husband's work clothes. (C.A. 2nd, June 3, 2014.)

Heskel v. City of San Diego (2014) _ Cal. App.4th _ : The Court of Appeal affirmed the trial court's summary judgment for the City. Because plaintiff failed to present any evidence that the sidewalk condition was

obvious such that the City, in the exercise of due care, should have become aware of it, his claim failed as a matter of law notwithstanding evidence that the condition was present for over one year before the accident. (C.A. 4th, filed June 13, 2014, published June 23, 2014.)

About the author: Monty A. McIntyre, is a Relentless Optimist® who serves as a mediator, arbitrator and referee with ADR Services, Inc. As a mediator his mission is to bring peace into the lives of people by excellently helping them resolve disputes. As

an arbitrator and referee his mission is to help parties obtain Reasonable, Rapid Resolution™ of their disputes. Mr. McIntyre is the 2014 President of the San Diego Chapter of the American Board of Trial Advocates (ABOTA). He was the 2002 President of the San Diego County Bar Association. He has extensive experience representing both plaintiffs and defendants in business, insurance bad faith and tort litigation. He is a Master in the Enright Inn of Court, and a multiple CASD Outstanding Trial Lawyer award recipient. ♦

Save The Date:

24th Annual SDDL Mock Trial

October 23-25, 2014

Volunteer Judges Needed!

The 24th Annual SDDL Mock Trial will be held on October 23-25, 2014 at the downtown Superior Court and the University of San Diego School of Law. Please mark your calendar and plan to participate as a judge!

Twenty teams from law schools around the country will be participating. Over sixty volunteer judges and lawyers will be acting as presiding judges and scoring judges. The competing teams will be from New York, Florida, Virginia, Texas and, of course, California.

SDDL members, other local litigators and various judges and mediators will be lending a hand by judging the competition each evening. We will provide dinners for the volunteer judges at the Courthouse prior to the preliminary trials on October 23-24. Many of the volunteer judges who participated last year have already volunteered to do so again this year. Last year, we had a very high level of competition, with the University of San Diego taking the top prize. All of the teams were well-prepared and exhibited a level of skill well beyond their years. The student-lawyers and witnesses knew the case file inside and out and were well-versed in the evidence and applicable law.

All of the preliminary trials will be held at the Courthouse. The top four teams will move on to the semi-final matches on the morning of October 25th at the USD School of Law. The semifinalists will be announced at a reception for all judges and contestants at the Westin Hotel on the evening of October 25th. The competition will be an opportunity for personal and professional learning and growth for all of us, as well. We look forward to seeing you at the 24th Annual Mock Trial. ♦

Generation Y, Pay Yourself First

By Zach A. MacDougall, Financial Advisor
NORTH STAR FINANCIAL

Many attorneys entering the workforce don't realize the significance in delaying their retirement contributions, until it is too late. Unfortunately, saving for retirement has taken the back seat to almost every other expense endured early in a law career, whether it's the mountain of student loan debt, the hefty down payment on a first residence, or simply the day to day living where fixed expenses have taken the driver's seat.

Today's Generation Y seems to want to live now, and worry about the rest later. While that might sound fun, every year you postpone starting a savings strategy, you make it tougher and tougher to achieve your long term financial goals. One common stance is to pay off law school debt prior to investing for retirement. Depending on the interest rate this may or may not be an efficient decision, as the potential long term growth of an investment portfolio might outperform the student loan interest rate, and should be determined on a case by case basis.

Another growing trend is that young attorneys are assuming their careers are going to take off and thus don't necessarily see the importance of saving the dollars early in their career with anticipation that they will become partner and dollars will become more accessible as their annual income increases. Yet, what typically happens is that even though their income might increase, so does one's expenses and the wants, tastes, and desires become that much more expensive.

Postponing your investing program for just a few years can cost you plenty, as you can see below.

The Cost of Waiting One More Year *

Your pre-tax accumulation in 30 years	\$148,575
Your pre-tax accumulation in 29 years	\$135,308
The difference	\$13,267

**Assuming \$1,000 per year at a 9% rate of return, does not take into account taxes or fees. This is a hypothetical example for illustrative purposes only and is not indicative of any particular investment.*

How can you start preparing now?

There may never be a convenient time to start a savings strategy. Whether you're saving for a home or trying to juggle finances to pay for your children's education, it's never going to be easy. One possible answer to this dilemma? Pay yourself first. Taking care of your retirement with the end goal in mind is the suggested way to position your financial picture. Consider paying your retirement bill first thing every month and then everything else, including your lifestyle and the purchase price of your home, could then follow suit.

The Advantages of Saving Early*

	If you saved from age 21-31	If you saved from age 31-65
Total contributed	\$ 10,000	\$ 34,000
Investment gain	\$300,000	\$180,711
Available at age 65	\$310,148	\$214,711

To get started – Consider these steps:

- Analyze your current spending and cash-flow:** Discover where your money actually goes.
- Reduce Your Expenses:** Once the numbers are written out in front of you, you may see several ways of reducing expenses.
- Establish a Spending and Savings Strategy:** Review your accumulation goals, and determine a minimum percentage of your income that you need to invest and save each month to meet your financial goals (10-20 percent, for example). Create an "Expense" item in your budget for your monthly savings amount, this will help prioritize your savings as a mandatory expenditure.

A "Pay Yourself First" philosophy creates an easy, systematic way to accumulate money and break a seemingly overwhelming task down into manageable segments. This strategy will help you get started towards reaching your financial goals.

The chart below illustrates the dynamic power of compound returns. Compounding is the process by which you not only earn money on your invested principal each year; you also earn additional interest on the money you earned in previous years. The amount you earn potentially grows or "compounds" at an increasing rate as the years go by. By starting your saving and investing program at an earlier age, you spread the accumulation task over a longer period of time and let your money benefit from the powerful force of compounding.

**These are pre-tax amounts assuming an investment of \$1,000 each year at a 9% rate of return, does not take into account taxes or fees. This is a hypothetical example for illustrative purposes only and is not indicative of any particular investment.*

The message is clear: If you start now, the long-term payoff for your discipline and follow-through could be a rewarding future.

These values assume that the currently assumed hypothetical elements will continue unchanged for all years shown. This is not likely to occur and actual results may be more or less favorable than those shown.

Investments will fluctuate and when redeemed may be worth more or less than when originally invested.
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California Supreme Court Decides *Iskanian v. CLS Transportation* and Resolves Questions About Class Action and Representative Action Waivers

By David D. Cardone
BUTZ, DUNN & DESANTIS, APC

On June 23, 2014 the California Supreme Court decided *Iskanian v. CLS Transportation Los Angeles, LLC*. The plaintiff, Arshavir Iskanian, was an employee driver for CLS Transportation. He sued CLS in 2006, claiming that CLS failed to pay him for overtime and meal and rest periods that he was forced to work. He also claimed that he was owed for unreimbursed expenses. The lawsuit proceeded as a class action although Iskanian had signed an arbitration agreement that apparently waived his right to participate in a class action. He also raised claims as a “representative action” under California’s Private Attorney General Act (“PAGA”). (PAGA allows private individuals to pursue enforcement of the California Labor Code on behalf of the state under certain circumstances.) The agreement between Iskanian and CLS also included a waiver of the right to participate in representative

actions. The questions of whether Mr. Iskanian’s class action waiver was enforceable and whether his waiver of PAGA claims was likewise enforceable are central in this new decision from the California Supreme Court.

The Court determined that following the United States Supreme Court’s 2011 decision in *AT&T v. Concepcion*, the class action waiver aspects of the CLS arbitration agreement were enforceable. But the question of whether the waiver of the right to proceed with PAGA claims was decided differently. Focusing on the fact that PAGA claims are authorized by and pursued on behalf of the state, the Court found that a waiver of the right to bring representative actions was not enforceable. In essence, the Court explained that PAGA claims cannot be waived because doing so is contrary to the Legislature’s goal of creating a tool to protect the interests of workers on behalf of the state.

Iskanian may end up before the United States Supreme Court due to the PAGA analysis, and because the opinion included a separate analysis addressing how the National Labor Relations Act affects class action waivers in arbitration agreements between employees and their employers. Another possible consequence of the *Iskanian* decision is an increase in the number of PAGA claims. While PAGA claims were historically not a preferred mechanism for plaintiffs’ lawyers because of the requirement that the recovery be shared with the state, it remains to be seen whether this decision will encourage the plaintiff’s bar to reconsider that logic.

The author is a partner of the San Diego based firm Butz Dunn & DeSantis where he practices in the area of employment law and routinely defends class actions involving misclassification and wage and hour claims. He can be reached at: dcardone@butzdunn.com. ♦

Bottom Line

Case Title: Atlas-Allied, Inc. v. San Diego Community College District and Nolte Inc.

Case Number: D061295, D061774

Appellate Judges: P.J. Nares, J. McDonald, J. Irion (Fourth District Court of Appeal)

Plaintiff and Appellate Counsel: Paul Mahoney, Mahoney and Soll

Defendant and Respondent’s Counsel: William Pate, Stutz, Artiano, Shinoff & Holtz (District) Karen Holmes, Balestreri Potocki & Holmes (Nolte/ Defense Counsel) and Gary Jacobsen and Lisa Shemonsky, Koenig Jacobsen LLP (Nolte/ Respondent’s Counsel)

Type of Case: Plaintiff filed a consolidated appeal from judgments in favor of District and Nolte in court trial before the Honorable Joel M. Pressman.

Facts: Atlas contracted with District to construct an underground fire suppression

system on the District’s Miramar College Campus after submitting the lowest bid on the project. Nolte, an engineering firm, designed and prepared the plans and technical specifications for the fire suppression system. After it completed the project, Atlas sued District and Nolte for damages it incurred as a result of allegedly unforeseen conditions on the project site that caused it to incur costs that exceeded the contract price. The trial court entered judgment after a court trial in favor of the District on Atlas’s causes of action against District for breach of contract and breach of implied warranty/failure to disclose hidden conditions on project and entered a separate judgment in favor of Nolte after granting Nolte’s motion for judgment under C.C.P. section 631.8 on Atlas’s causes of action for negligence and negligent misrepresentation.

Outcome: Judgments affirmed. As to Nolte and the negligence cause of action, Justice Nares

referred to the Weseloh, Bily and Biankaja opinions and concluded that Nolte, who was not in privity of contract with Atlas, did not owe Atlas a duty of care. Justice Nares also analyzed the recent Beacon case and concluded that because Nolte did not uniquely possess knowledge and expertise about the soils conditions on the project site and had no control over Atlas’s construction of the project, the Court was not going to impose designer liability to a remote third party.

As to the negligent misrepresentation cause of action, the Court found that Nolte did not make a positive assertion about the soils conditions at the project. The Court also noted on Atlas’s argument that Nolte was acting as an ostensible agent of the District that Atlas’s reverse theory of vicarious liability was unnecessary because Atlas directly sued Nolte. ♦

INSURANCE LAW UPDATE

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in the chimney, as well as gouges where the limbs had hit it, and Hansen took pictures of the damage to the chimney. Again, Hansen falsely told the Bocks that their policy did not cover the cost of clean up, explaining “If a car had hit the tree causing it to fall, then the clean-up would be covered but since the wind caused the limb to fall, the cost to clean up the limbs was not covered.” Hansen told Mr. Bock to get his chainsaw and remove the limbs himself, and as he did so, Hansen yelled, “Atta boy! See you can do it! Now go get a few friends to finish it up.” On September 17, Travelers provided the Bocks with a revised estimate for the loss. While the revised estimate increased the amount payable to \$3,655.23, it eliminated amounts previously included for damage to the hardwood floor and fence, based on the false statement that the Bocks had confirmed during the re-inspection that there was no damage to those items, despite obvious physical evidence to the contrary. That same day, acting at the request of Travelers, Roy Anderson of Vertex Construction Services inspected the Bocks’ house. Neither Vertex nor Anderson had a valid California contractor’s license. Because the limbs and debris had already been removed, Mrs. Bock provided Anderson a disk containing digital images that showed the fallen limbs and damage on the morning of the accident. Anderson sent Hansen a report dated September 29, detailing the results of his inspection and which concluded — falsely, the Bocks alleged — that “[n]o scarring, gouging, or scuff marks were noted on the siding or trim materials on the northeast corner of the residence.” Anderson’s report also falsely stated that “[t]here was no visual evidence that the fallen tree branch impacted the chimney, or that the fallen tree branch ... propagated any damage to the natural rock chimney,” instead concluding that the “fireplace appear[ed] to be in good and serviceable condition.” Finally, Anderson’s report concluded that the observed cracks in the chimney were minor and were “due to the age of the chimney and the residence,” and that inspection of the interior and exterior of the house revealed that “[t]he only damage ... due to the fallen tree branch [was] the broken window and frame.” Hansen did not perform any tests to support his conclusion. By letter dated October 1, Hansen informed the Bocks

that based on the Vertex report Travelers was denying coverage for the chimney damage. The Bocks asked Priest (a licensed contractor) to review the Vertex report and provide a response. He did, preparing a report disputing the false statements contained in the Vertex report and describing how the tree limb damaged the chimney, a conclusion he reached having inspected the property three times. On January 14, 2011, the Bocks, through their attorney, submitted additional information to Travelers, including Priest’s report, and requested that Travelers reconsider its coverage determination. Travelers never responded.

The Bocks sued both Travelers and Hansen, alleging negligent misrepresentation and intentional infliction of emotional distress against Hansen. The trial court sustained Hansen’s demurrer without leave to amend, concluding that the Bocks “have presented no convincing argument for allowing these claims to stand against defendant Hansen in what is a contract based action.”

In reversing the trial court, the appellate court rejected the trial court’s rationale that adjusters, as non-parties to the insurance contract, are immune from liability for independent torts they commit while acting on behalf of the insurer. The issue, in the appellate court’s view, was not whether employees of an insurer such as Hansen could be liable for their own torts, whether the insurer is liable or not, but whether the Bocks had adequately alleged the elements of causes of action for negligent misrepresentation and intentional infliction of emotional distress.

The appellate court acknowledged that Hansen’s responsibility for negligent misrepresentation depended on the existence of a legal duty and that no California case authority has held that an adjuster acting on behalf of an insurer owes an independent duty to the insureds whose claim he is adjusting. The appellate court based its imposition of that independent duty on the California Supreme Court’s characterization of the relationship between a first-party insurer and its insured as a “special relationship” with “heightened duties” as articulated in *Vu v. Prudential Property & Casualty Insurance Co.* (2001) 26 Cal.4th 1142. Such special relationship, reasoned the appellate court, leads to the conclusion

that Hansen, the employee of the party in the special relationship, had a duty to the Bocks. In so ruling, the appellate court either distinguished or dismissed contrary authority. Having imposed a duty of care on Hansen, the appellate court turned to the elements of a cause of action for negligent misrepresentation and concluded that the Bocks adequately alleged each element. In response to Hansen’s argument that the Bocks’ reliance was unjustified because the misrepresentation contradicted the express terms of the policy, the appellate court stated that “We are nonplussed: not only does Hansen acknowledge his ‘clearly’ erroneous statement to the Bocks, but he then faults them for believing him.”

Moving onward, the appellate court agreed with the trial court that while the Bocks’ complaint did not sufficiently allege a cause of action for intentional infliction of emotional distress, it found that the trial court committed an abuse of discretion when it refused, “without explanation, indeed probably without reflection,” to allow the Bocks to amend their complaint to allege that Hansen knew they were susceptible to mental distress. The appellate court therefore ordered the trial court to allow the Bocks to file an amended complaint. ♦

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